



IFW

Attorney Docket No. 9092-407CT

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Rhodri Evans et al;

Application No.: 10/626,754

Group Art Unit: 1745

Filed: July 24, 2003

For: SEALING STRUCTURE FOR TERMINAL POSTS OF BATTERIES

Date: August 18, 2004

Commissioner for Patents

P.O. Box 1450

Alexandria, VA 22313-1450

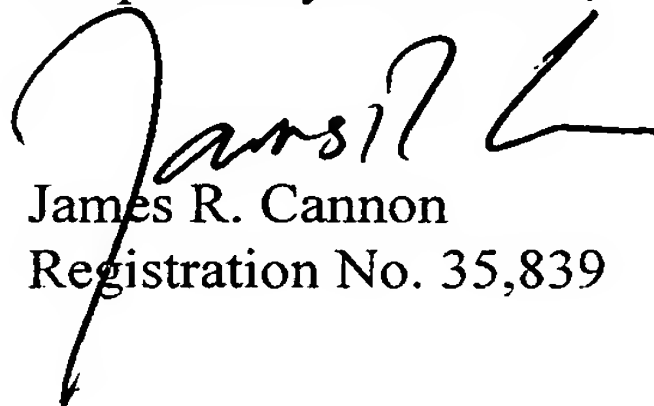
**NOTIFICATION OF PENDING LITIGATION**

Sir:

This is a Notification of Pending Litigation in Parent U.S. Patent No. 6,602,638.

Enclosed herewith please find copies of the Plaintiff's Complaint, filed by Hawker Energy Products Limited in the Defendants' Amended Answer, and The Plaintiff's Reply filed in connection with the lawsuit. We are forwarding these materials to the PTO so that the Examiner is aware of them in connection with the examination of the continuing application No. 10/626,754.

Respectfully submitted,

  
James R. Cannon  
Registration No. 35,839

Myers Bigel Sibley & Sajovec, P.A.

P. O. Box 37428

Raleigh, North Carolina 27627

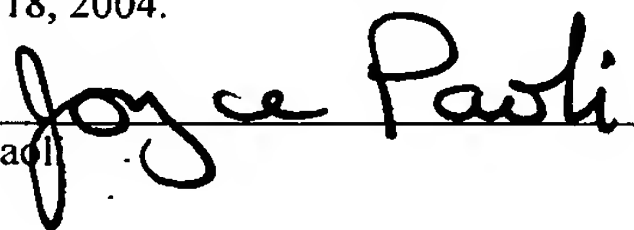
Telephone: (919) 854-1400

Facsimile: (919) 854-1401

Customer No. 20792

**Certificate of Mailing under 37 CFR 1.8 (or 1.10)**

I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on August 18, 2004.

  
Joyce Pauli



BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
SOUTHERN DISTRICT

HAWKER ENERGY PRODUCTS LIMITED )

Plaintiff, )

v. )

No. 03-3332-CV-S-JTM

NORTHSTAR BATTERY COMPANY, LLC, )  
SCOTT ERWIN, FRANK FLEMING, )  
JOEL GIBSON and GERALD HOFFMAN )

Defendants. )

COMPLAINT

Hawker Energy Products Limited, for its cause of action against the defendants,  
NorthStar Battery Company, LLC, Scott Erwin, Frank Fleming, Joel Gibson and Gerald  
Hoffman, states and alleges as follows:

NATURE OF ACTION

1. This is an action for patent infringement arising under the patent laws of the United States, Title 35, United States Code. This action results from the defendants' making, using, offering to sell and selling lead acid batteries that incorporate a sealing structure for battery terminals as claimed in plaintiff's U.S. Patent 6,602,638 B1.
2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 (federal question), and 1338(a) (action arising under an Act of Congress relating to patents) to obtain injunctive relief and to recover damages to redress defendants' acts of infringement.
3. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1400(b).

## **THE PARTIES**

1. Plaintiff Hawker Energy Products Limited ("Hawker") is a U.K. Corporation having a principal place of business at Stevenson Street, Newport, South Wales, NP9 0XJ, Great Britain.

2. Defendant NorthStar Battery Company, LLC ("NorthStar"), is a limited liability corporation organized and existing under the laws of the State of Missouri, having a principal place of business at 4000 Continental Way, Springfield, Missouri 65803.

3. Defendant Erwin is an officer of NorthStar and is a resident of Missouri, residing at 2802 N. Skyview Lane, Ozark, Missouri 65721.

4. Defendant Fleming is an officer of NorthStar and is a resident of Missouri, residing at 2802 E. Covey Lane, Ozark, Missouri 65721.

5. Defendant Gibson is an officer of NorthStar and is a resident of Missouri, residing at 960 Mueller Rd., Sparta, Missouri 65753.

6. Defendant Hoffman is an officer of NorthStar and is a resident of Florida, residing at 2350 Oxford Drive, Pensacola, Florida 32503.

7. NorthStar and Erwin, Fleming, Gibson and Hoffman, acting on behalf of NorthStar, are direct competitors of Hawker in the battery market.

## **FIRST CLAIM (PATENT INFRINGEMENT)**

8. On August 5, 2003, United States Letters Patents 6,602,638 B1 ("the '638 patent") entitled "Sealing Structure For Terminal Posts of Batteries" was duly and legally issued to Rhodri Wyn Evans, Paul John Rendell and Roger James Knight. A copy of the '638 patent is attached hereto as Exhibit A.

9. The inventors have duly assigned all right, title and interest in and to the '638 patent to Hawker, which assignment was recorded in the U.S. Patent and Trademark Office. Hawker is the sole owner of the '638 patent and has the sole right to sue and recover for its infringement.

10. On information and belief, NorthStar has infringed, actively induced and knowingly contributed to the infringement by others of the '638 patent by making, using, selling and/or offering to sell lead acid batteries that incorporate a sealed terminal post as claimed in the '638 patent, including specifically a NorthStar battery sold under the description NSB170FT, and is still infringing, actively inducing and knowingly contributing to such infringement in violation of 35 U.S.C. § 271.

11. On information and belief, as officers of NorthStar, defendants Erwin, Fleming, Gibson and Hoffman have actively induced and knowingly contributed to the infringement by others of the '638 patent, and are still actively inducing and knowingly contributing to such infringement in violation of 35 U.S.C. § 271.

12. On information and belief, the defendants had knowledge of the invention of the '638 patent prior to NorthStar's making, using, selling and/or offering to sell its lead-acid battery, and the defendants' infringement of the '638 patent is willful, wanton and in deliberate disregard of Hawker's rights under the '638 patent.

13. As a consequence of the acts of infringement by defendants of the '638 patent complained of herein, Hawker has been damaged in an amount yet to be determined, and Hawker will continue to be damaged by such acts in the future unless such acts are enjoined by this Court.

## REQUESTED RELIEF

14. WHEREFORE, Hawkers prays for an entry of judgment providing:
- (a) That defendants have infringed one or more of the claims of the '638 patent.
  - (b) That defendants' infringement of one or more claims of the '638 patent has been willful and deliberate.
  - (c) That NorthStar, its officers, agents, employees, successors and assigns, all person and entities holding by, through, or under them, and those acting for or on their behalf be permanently enjoined from further infringement of the '638 patent.
  - (d) That Erwin, Fleming, Gibson and Hoffman, and those acting for or on their behalf, be permanently enjoined from further infringement of the '638 patent.
  - (e) That defendants account for and pay to Hawker all damages caused to Hawker by defendants' infringement of the '638 patent, and that such damages be trebled in view of the deliberate and willful nature of the infringement of such patents in accordance with 35 U.S.C. § 284.
  - (f) That Hawker be granted pre-judgment and post-judgment interest on the damages caused to it by reason of defendants' infringement of the '638 patent.
  - (g) That Hawker be granted its reasonable attorney fees, in accordance with 35 U.S.C. § 285, in view of the willful and deliberate infringement of the '638 patent by defendants.
  - (h) That Hawker be granted such other and further relief as the equity of the case may require and the Court may deem just and proper.

HAWKER ENERGY PRODUCTS LIMITED

Date: September 10, 2003

/s/ Richard E. Walters  
Randy P. Scheer #37214  
Richard E. Walters #48268  
BLACKWELL SANDERS PEPER MARTIN, LLP  
The Hammons Tower  
901 St. Louis Street - Suite 1900  
Springfield, Missouri 65806  
417-268-4000  
417-268-4040 (facsimile)

**Attorneys for Plaintiff**

OF COUNSEL:

Charles H. Mottier  
Anne E. Naffziger  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza, Suite 4900  
180 N. Stetson  
Chicago, Illinois 60601-6780  
312-616-5600  
312-616-5700 (facsimile)



UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
SOUTHERN DIVISION

HAWKER ENERGY PRODUCTS LIMITED,

Plaintiffs,

v.

NORTHSTAR BATTERY COMPANY, LLC,  
SCOTT ERWIN, FRANK FLEMING,  
JOEL GIBSON and GERALD HOFFMAN,

Defendants.

No. 03-3332-CV-S-JTM

FIRST AMENDED ANSWER,  
AFFIRMATIVE DEFENSES,  
AND COUNTERCLAIMS

**DEFENDANTS' FIRST AMENDED  
ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

COMES NOW NorthStar Battery Company, LLC, Scott Erwin, Frank Fleming, Joel Gibson, and Gerald Hoffman, by and through their undersigned counsel, Thompson Coburn LLP, and hereby states the following for their Answer, Affirmative Defenses, and Counterclaims to the Complaint of Hawker Energy Products Limited. If an averment is not specifically admitted, it is denied.

**NATURE OF ACTION**

1. The averments of Paragraph 1 of the Complaint are denied.
2. It is not clear that Paragraph 2 of the Complaint contains any averments that require an answer, but, to the extent it does, the averments are denied.
3. The averments of Paragraph 3 of the Complaint are denied.

## THE PARTIES

1. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 1 (second occurrence) of the Complaint and therefore deny the same.

2. It is denied that NorthStar Battery is a limited liability corporation. NorthStar Battery is a limited liability company organized under the laws of the State of Missouri. The remainder of Paragraph 2 (second occurrence) of the Complaint is admitted.

3. The averments of Paragraph 3 (second occurrence) of the Complaint are admitted.

4. The averments of Paragraph 4 of the Complaint are admitted.

5. The averments of Paragraph 5 of the Complaint are admitted.

6. The averments of Paragraph 6 of the Complaint are admitted.

7. As to Messrs. Erwin, Fleming, Gibson and Hoffman, the averments of Paragraph 7 of the Complaint are denied. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining averments of Paragraph 7 of the Complaint and therefore deny the same.

8. It is admitted that United States Patent No. 6,602,638 ("the '638 patent") entitled "Sealing Structure For Terminal Posts of Batteries" issued August 5, 2003. The remaining averments of Paragraph 8 of the Complaint are denied.

9. The averments of Paragraph 9 of the Complaint are denied.

10. The averments of Paragraph 10 of the Complaint are denied.

11. The averments of Paragraph 11 of the Complaint are denied.

12. The averments of Paragraph 12 of the Complaint are denied.



13. The averments of Paragraph 13 of the Complaint are denied.

### **AFFIRMATIVE DEFENSES**

Further answering the Complaint and as additional defenses thereto, Defendants assert the following affirmative defenses without assuming the burden of proof when such burden would otherwise be on Plaintiff:

#### **First Affirmative Defense:**

Defendants have not infringed and are not infringing any claim of the '638 patent.

#### **Second Affirmative Defense:**

Upon information and belief and after a reasonable opportunity for further investigation, each claim of the '658 patent is invalid because of its failure to meet the conditions of patentability and to comply with the requirements of Title 35 of United States Code, including 35 U.S.C. §§ 101, 102, 103 and/or 112.

#### **Third Affirmative Defense**

Upon information and belief and after a reasonable opportunity for further investigation, Defendants allege that by reason of the proceedings in the United States Patent and Trademark Office during the prosecution of the application for the '638 patent, specifically the admissions, representations, and amendments made on behalf of the applicant for such patent to the Patent and Trademark Office, Hawker is precluded or estopped from asserting any construction of the claims of the '638 patent to cover or include any product made, used, sold, offered for sale in, or imported into, the United States by Defendants.

#### **Fourth Affirmative Defense**

Upon information and belief and after a reasonable opportunity for further investigation, Defendants allege that by reason of the proceedings in the United States Patent

and Trademark Office during the prosecution of the application for the '638 patent, specifically the admissions, representations, and amendments made on behalf of the applicant for such patent to the Patent and Trademark Office, Hawker is precluded or estopped from claiming an interpretation or scope, or extending the coverage, of the claims of the '638 patent under the doctrine of equivalents to cover or include any product made, used, sold, offered for sale in, or imported into, the United States by Defendants.

### COUNTERCLAIM

Counterclaim Plaintiffs, for their counterclaim against Hawker, allege the following:

1. This counterclaim is an action arising under the Declaratory Judgment Act 28 U.S.C. § 2201 *et seq.* and the patent laws of the United States, 35 U.S.C. § 1 *et seq.*, for a judgment declaring that the claims of the '638 patent are invalid, unenforceable, and not infringed by Defendants.
2. Counterclaim Plaintiff NorthStar Battery Company, LLC is a limited liability company organized and existing under the laws of the state of Missouri, having a principal place of business at 4000 Continental Way, Springfield, Missouri 65803.
3. Counterclaim Plaintiff Scott Erwin is an officer of NorthStar and is a resident of Missouri, residing at 2802 N. Skyview Lane, Ozark, Missouri 65721.
4. Counterclaim Plaintiff Frank Fleming is an officer of NorthStar and is a resident of Missouri, residing at 2802 E. Covey Lane, Ozark, Missouri 65721.
5. Counterclaim Plaintiff Joel Gibson is an officer of NorthStar and is a resident of Missouri, residing at 960 Mueller Rd., Sparta, Missouri 65753.
6. Counterclaim Plaintiff Gerald Hoffman is an officer of NorthStar and is a resident of Florida, residing at 2350 Oxford Drive, Pensacola, Florida 32503.

7. Counterclaim Defendant Hawker Energy Products Limited is a U.K. Corporation having a principal place of business at Stevenson Street, Newport, South Wales, NP9 0XJ, Great Britain.

8. This Court has subject matter jurisdiction over this counterclaim pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, 28 U.S.C. §§ 1331, and under 35 U.S.C. § 1338(a). By virtue of the Complaint filed by Hawker in this Action, there is an actual justiciable controversy between Counterclaim Plaintiffs and Hawker concerning the non-infringement, invalidity, and unenforceability of the '638 patent.

9. Venue is proper in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c), and 28 U.S.C. § 1400(b). Hawker is subject to personal jurisdiction in this judicial district because Hawker filed this action in this district.

10. Counterclaim Plaintiffs have not infringed and are not infringing any claim of the '638 patent.

11. Upon information and belief and after an opportunity for further investigation and discovery, one or more of the claims of the '638 patent are invalid pursuant to 35 U.S.C. § 102.

12. Upon information and belief and after an opportunity for further investigation and discovery, one or more of the claims of the '638 patent are invalid pursuant to 35 U.S.C. § 103.

13. Upon information and belief and after an opportunity for further investigation and discovery, one or more of the claims of the '638 patent are invalid pursuant to 35 U.S.C. § 112, first paragraph.

14. Upon information and belief and after an opportunity for further investigation and discovery, one or more of the claims of the '638 patent are invalid pursuant to 35 U.S.C. § 112, second paragraph.

WHEREFORE, Counterclaim Plaintiffs deny that that Hawker is entitled to any relief and pray for:

- A. A judgment that the claims of the '638 patent are invalid;
- B. A judgment that each of the claims of the '638 patent are not infringed;
- C. A judgment enjoining Hawker, its officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them from directly or indirectly charging infringement, or instituting any further action for infringement of the '638 patent against Counterclaim Plaintiffs or anyone in privity with Defendants, including its officers, agents, servants, employees, attorneys, customers, suppliers, agents, successors and assigns;
- D. A judgment that this case is an exceptional one, entitling Defendants to their reasonable attorneys' fees pursuant to 35 U.S.C. § 285;
- E. Recovery of costs against Hawker and such other and further relief as this Court deems just and proper.

Respectfully submitted,

**HUSCH & EPPENBERGER, LLC**

By: s/ Lincoln Knauer

Lincoln Knauer, 19745  
1949 East Sunshine Street, Suite 2-300  
Springfield, MO 65804-1605  
417-862-6726  
FAX: 417-862-6948

*of counsel:*

**THOMPSON COBURN LLP**

John M. Howell

Alan H. Norman

Jacob S. Wharton

One US Bank Plaza

St. Louis, MO 63101

314-552-6000

FAX: 314-552-7000

*Attorneys for Defendants*



UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
SOUTHERN DIVISION

HAWKER ENERGY PRODUCTS LIMITED )

Plaintiff, )

v. )

NORTHSTAR BATTERY COMPANY, LLC, )  
SCOTT ERWIN, FRANK FLEMING, )  
JOEL GIBSON and GERALD HOFFMAN. )

Defendants. )

Civil Action No.  
03-3332-CV-S-JTM

**HAWKER ENERGY PRODUCTS LIMITED'S REPLY TO  
COUNTERCLAIMS OF NORTHSTAR BATTERY COMPANY, LLC,  
SCOTT ERWIN, FRANK FLEMING, JOEL GIBSON AND GERALD HOFFMAN**

COMES NOW Hawker Energy Products Limited, through its undersigned attorneys, and hereby answers Defendants/Counterclaim Plaintiffs' Counterclaim to the Complaint of Hawker Energy Products Limited as follows. Any averment not specifically admitted shall be deemed denied.

1. The averments of Paragraph 1 of the Counterclaim are admitted as to the statutory sections for bringing a Declaratory Judgment claim but are denied as to the declaration that the claims of the '638 payment are invalid, unenforceable, and not infringed by Defendants/Counterclaim Plaintiffs.

2. The averments of Paragraph 2 of the Counterclaim are admitted.

3. The averments of Paragraph 3 of the Counterclaim are admitted.

4. The averments of Paragraph 4 of the Counterclaim are admitted.

5. The averments of Paragraph 5 of the Counterclaim are admitted.

6. The averments of Paragraph 6 of the Counterclaim are admitted.

7. The averments of Paragraph 7 of the Counterclaim are admitted.

8. The averments of Paragraph 8 of the Counterclaim are admitted as to the statutory basis for this Court's subject matter jurisdiction over the counterclaim. The remainder of the averments of Paragraph 8 of the Counterclaim are denied.

9. The averments of Paragraph 9 of the Counterclaim are admitted.
10. The averments of Paragraph 10 of the Counterclaim are denied.
11. The averments of Paragraph 11 of the Counterclaim are denied.
12. The averments of Paragraph 12 of the Counterclaim are denied.
13. The averments of Paragraph 13 of the Counterclaim are denied.
14. The averments of Paragraph 14 of the Counterclaim are denied.

WHEREFORE, Hawker Energy Products Limited requests that Defendants/Counterclaim Plaintiffs' Counterclaim for Declaratory Judgment be dismissed, that their prayer for relief be denied and any other relief the Court deems just and proper.

**BLACKWELL SANDERS PEPER MARTIN, LLP**

/s/ Randy P. Scheer

Randy P. Scheer #37214

Richard E. Walters #48268

The Hammons Tower

901 St. Louis Street - Suite 1900

Springfield, Missouri 65806

Telephone / 417-268-4000

Facsimile / 417-268-4040

**Attorneys for Plaintiff/Counterclaim Defendant  
Hawker Energy Products Limited**

OF COUNSEL:

Charles H. Mottier  
Anne E. Naffziger  
LEYDIG, VOIT & MAYER, LTD.  
Two Prudential Plaza, Suite 4900  
180 N. Stetson  
Chicago, Illinois 60601-6780  
312-616-5600  
312-616-5700 (facsimile)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing was served via electronic transmission this 8<sup>th</sup> day of March, 2004, to:

Lincoln Knauer  
Bryan O. Wade  
Husch & Eppenberger  
1949 East Sunshine, Suite 2-300  
Springfield, MO 65804-1605  
Telephone: (417) 862-6726  
Facsimile: (417) 862-9648

John M. Howell  
Alan H. Norman  
Jacob S. Wharton  
Thompson Coburn LLP  
One US Bank Plaza  
St. Louis, MO 63101  
Telephone: (314) 552-6000  
Facsimile: (314) 552-7000

Attorneys for Defendants

/s/ Randy P. Scheer

---